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*Submitted Electronically via <https://foiaonline.gov/>*

Freedom of Information Officer  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW (2822T)  
Washington, DC 20460

Regional Freedom of Information Officer  
U.S. EPA, Region 6  
120 Elm Street  
Dallas, TX 75270

**Re: New Mexico Water Pollution and Concentrated Animal Feeding Operations**

Dear EPA FOIA Officer:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of Food & Water Watch (FWW). This request seeks documents regarding the Environmental Protection Agency's (EPA) implementation and enforcement of the Clean Water Act (CWA) as it relates to concentrated animal feeding operations (CAFOs) in New Mexico.

FWW and its members have a strong interest in information related to New Mexico CAFOs, and whether EPA is adequately addressing the role that the CAFO industry plays in New Mexico's pervasive water pollution problems.

FWW is a national, non-profit, membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. Industrial livestock pollution is one of FWW's priority issues, and it is engaged in several campaigns to reduce CAFO pollution nationally through stronger regulation, transparency, and enforcement. FWW prioritizes CAFO pollution in New Mexico specifically, where our work has included a campaign for a moratorium on all new and expanding CAFOs in the state.

## Records Requested

Pursuant to FOIA, the FWW request copies of any and all documents, records and communications of any kind, including but not limited to e-mails, interoffice memoranda, and notes, (hereinafter records), relating to EPA implementation and enforcement of the CWA as it relates to CAFOs. FWW specifically requests the following records from September 1, 2016 to the date of production:

1. All National Pollutant Discharge Elimination System (NPDES) permits and/or applications to register for the NPDES General Permit for CAFOs (NMG01000) for all CAFOs currently covered under the New Mexico NPDES permit program (New Mexico CAFO program);
2. All annual report documentation and nutrient management plans for CAFOs covered under the New Mexico CAFO program;
3. All records documenting whether a hydrologic connection exists between a permitted CAFO's contained wastewater and a jurisdictional water of the United States, including records certifying that there will be no significant leakage from retention structures, records certifying that any leakage from retention structures will not migrate to jurisdictional waters, and records documenting the need for liners, leak detection systems, and monitoring wells to prevent the potential contamination of jurisdictional waters;
4. All records related to EPA enforcement of the New Mexico CAFO program, including but not limited to inspection reports, monitoring well data, investigation documentation, notices of violations, and consent decrees;
5. All records and communications regarding the upcoming renewal of the NPDES General Permit for CAFOs in New Mexico (NMG01000), the current version of which expired August 31, 2021;
6. All communications between EPA and the New Mexico Environment Department (NMED) and/or the New Mexico Department of Agriculture (NMDA), regarding the New Mexico CAFO program, and/or the State Groundwater Discharge permit program as it relates to CAFOs;
7. All communications between EPA and the Dairy Industry Group for a Clean Environment, Inc. and/or the Dairy Producers of New Mexico, regarding the New Mexico CAFO program, and/or the State Groundwater Discharge permit program as it relates to CAFOs; and
8. All written policies regarding how EPA determines whether unpermitted CAFOs require NPDES coverage.

This request applies to all such records in any form, including (without limit) correspondence sent or received, memoranda, notes, telephone conversation notes, maps, analyses, agreements, contracts, e-mail messages, e-mail attachments, and electronic files the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. This request does not include any records that EPA currently maintains on its website.

### **Claims of Exemption from Disclosure**

If you regard any requested records or portions of records as exempt from disclosure under FOIA, FWW asks that you please exercise your discretion to disclose them nonetheless. After careful review for the purpose of determining whether any of the information is exempt from disclosure, please provide any reasonably segregable non-exempt portions of exempt records, as required by FOIA. Should you elect to invoke an exemption to FOIA, please provide the required full or partial denial letter and sufficient information to appeal the denial.

In accordance with the minimum requirements of your due process, this information should include:

1. Basic factual information, including the author, origin, date, length, and address of withheld records or portions of records; and
2. Explanations and justifications for denial, including identification of the exemption(s) applicable to the withheld information and explanations of how each exemption applies to each withheld record or portion of a record.

### **Fee Waiver Request**

FWW requests that you waive any applicable fees for this request because disclosure is clearly in the public interest. As described below, disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups such as FWW access to government documents without the payment of fees. The statute is to be liberally construed in favor of waivers for noncommercial requesters. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”). As explained below, FWW satisfies the criteria for a fee waiver established in FOIA, described as a multi-factor test in EPA’s implementing regulations, 40 C.F.R. § 2.107(l).

**Requirement 1: Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government**

*Factor 1: The subject matter of the requested documents concerns operations or activities of the federal government*

FWW seek records related to EPA implementation and enforcement of the CWA for CAFOs. As this request focuses on these EPA operations and activities, the information requested clearly “concerns the operations and activities of the federal government,” and therefore satisfies the first fee waiver criterion. 40 C.F.R. § 2.107(l)(2)(i).

*Factor 2: The disclosure is “likely to contribute” to understanding of federal government operations or activities*

Disclosure is “likely to contribute” to an understanding of EPA’s operations or activities, 40 C.F.R. § 2.107(l)(2)(ii), because it will shed light on how the EPA is exercising its administration, enforcement, and oversight responsibilities of the NPDES program for CAFOs in New Mexico. The records requested will be “meaningfully informative,” *id.* of EPA’s activities because the information is not “already . . . in the public domain, in either a duplicative or a substantially identical form.” *Id.* Specific, current and comprehensive information about EPA’s implementation and enforcement of the New Mexico CAFO program is not currently publicly available. Such information will allow FWW and the public to better understand the extent and effectiveness of EPA’s actions in ensuring that New Mexico CAFOs are fully in compliance with the CWA.

*Factor 3: The disclosure will contribute to “public understanding” of EPA’s operations and activities*

The disclosure will contribute to “public understanding” of the subject of the request because it will contribute to the understanding of a “reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 40 C.F.R. § 2.107(l)(2)(iii). *See also Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (in determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is “whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.”).

FWW will effectively disseminate the records and otherwise make the records and information in the records accessible and available to a broad audience of interested persons, both within New Mexico and nationally. It will do so in ways that effectively contribute to the public’s understanding. FWW is a membership organization with a staff of approximately 115, including researchers, organizers, attorneys, and communications professionals. FWW has policy and legal expertise and staff regularly analyze data, including FOIA records, and use this information to write, speak, and advocate to the media and the public on environmental issues. FWW frequently uses FOIA records and other public data to draft and issue policy-based reports related to issues

of public interest. Many of these reports focus in depth on CAFOs and water pollution.<sup>1</sup> FWW has also issued a policy-based report specifically addressing the impacts of CAFOs in New Mexico.<sup>2</sup> FWW has a long history of analyzing federal government CAFO records, specifically, and making them available to the public in a way that is easy to understand. FWW is therefore prepared to analyze the information and present it to the public in a way that will most effectively increase public understanding of the subject.

FWW is also well-positioned to effectively disseminate the information obtained from the disclosed records such that it reaches a broad audience of interested members of the public through diverse and highly effective channels, including: emails to some or all of FWW's hundreds of thousands of supporters nationally and roughly 15,500 supporters in New Mexico alone; FWW's website, Facebook pages, including an New Mexico-specific page with over 1,100 followers, other social media outlets, and newsletters; traditional media outlets in New Mexico and nationally; press releases; and presentations at community meetings and conferences attended by rural citizens impacted by CAFO pollution, environmental attorneys and advocates, and other interested members of the public. FWW's work on CAFO pollution and EPA regulation of CAFOs has garnered significant media attention, including coverage in Politico, Inside EPA, Bloomberg, Greenwire, demonstrating FWW's ability to reach interested members of the public with the requested information. Further, FWW is well-known to interested members of the public and to other organizations with interested members as a national leader on issues related to CAFO pollution, which facilitates FWW's dissemination of information to this audience.

In short, the FWW has demonstrated ability to disseminate the requested information to New Mexicans and others interested in the EPA's implementation and enforcement of the CWA as it relates to the state's CAFO industry.

FWW will also make the information available to state and local organizations with members and supporters interested in the subject. Food & Water Watch is a member of the New Mexico Citizens Dairy Coalition, which is a coalition of numerous organizations, including both grassroots New Mexico groups focused on protecting their communities from the adverse environmental impacts of CAFOs, as well as regional and national organizations also focused on CAFO issues. FWW will share information with the coalition member organizations, which include Amigos Bravos, Animal Protection New Mexico, Interfaith Worker Justice, New Mexico Environmental Law Center, the Sierra Club New Mexico Chapter, Socially Responsible Agriculture Project, and Southwest Organizing Project. Cumulatively, these groups have many members in New Mexico and nationwide. Due to the large collective membership of citizens impacted by CAFOs and interested in this subject, FWW's demonstrated ability to effectively analyze EPA records and disseminate information to the public directly and through the media, and their relationships with other organizations that can reach a broad audience of persons

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<sup>1</sup> See, e.g., FWW, *Factory Farm Nation: 2020 Edition* (Apr. 2020), available at: [https://foodandwaterwatch.org/wp-content/uploads/2021/03/ib\\_2004\\_updfacfarmmaps-web2.pdf](https://foodandwaterwatch.org/wp-content/uploads/2021/03/ib_2004_updfacfarmmaps-web2.pdf).

<sup>2</sup> See FWW, *The Urgent Case for a Moratorium on Mega-Dairies in New Mexico* (Nov. 2020), available at: [https://www.foodandwaterwatch.org/wp-content/uploads/2021/03/fs\\_2011\\_nmegadairies-fin.pdf](https://www.foodandwaterwatch.org/wp-content/uploads/2021/03/fs_2011_nmegadairies-fin.pdf).

interested in the information in the requested records, FWW is uniquely able to contribute to “public understanding” and meet this fee waiver criterion.

*Factor 4: The disclosure is likely to contribute “significantly” to public understanding of EPA activities*

FWW also meets the fourth fee waiver criterion, because the public’s understanding of EPA’s operations or activities related to the New Mexico CAFO program “as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent.” 40 C.F.R. § 2.107(l)(2)(iv). Because FWW, coalition partners, and interested members of the public know little about EPA’s current plans for the program, including when EPA will be renewing the New Mexico General NPDES permit for CAFOs, and what, if any, changes EPA will propose to the permit program at that time, the requested disclosures will undoubtedly increase public understanding of these activities by a significant extent.

None of the records requested are currently available on EPA’s website, elsewhere on the Internet, or have been previously published by EPA. The requested records have significant informative value, because they will shed light on how the EPA is ensuring that New Mexico CAFOs comply with the CWA, and whether New Mexicans can expect a protective CAFO regulatory program going forward.

As discussed above, FWW has demonstrated its ability to significantly increase public understanding of EPA’s recent actions pursuant to New Mexico’s CAFO program and New Mexico water quality. FWW is experienced at analyzing, synthesizing, and distilling voluminous and complex federal agency records and making them available and easily understandable to interested members of the public. In so doing, FWW is able to ensure that the increase in public understanding will be significant.

## **Requirement 2: Disclosure is not primarily in the commercial interest of the Requester**

*Factor 1: Requester has no commercial interest in obtaining the information*

The second element of the fee waiver analysis addresses the requester’s “commercial interest” in the information. Two factors must be addressed when determining whether the information requested is “primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). The first factor is whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i). Here, as a nonprofit organization, FWW has no commercial, trade, or profit interest in the material requested. FWW will not be paid for, or receive other commercial benefits from, the publication or dissemination of the material requested. The requested material will be disseminated solely for the purpose of informing and educating the public and will not be used for or result in commercial gain.

*Factor 2: Disclosure is not “primarily in the commercial interest of the requester”*

The second factor of the commercial interest consideration hinges on the primary interest in the disclosure, and requires a weighing of any commercial interest against the public interest in



disclosure. 40 C.F.R. § 2.107(l)(3)(ii). Clearly, there is great public interest in the release of the materials sought because they will allow the public to learn about and evaluate the adequacy of EPA's New Mexico CAFO program. Thus, even if FWW did have some "commercial" interest in the documents requested, which it doesn't, a complete fee waiver would still be required because the FWW's "primary" interest in the material is to inform the public about the operations and activities of the government. Therefore, this is a situation in which the "public interest is greater in magnitude than that of any identified commercial interest" of the requester. *Id.* Of course in this case, even if the public interest were not so significant, it would clearly outweigh the nonexistent commercial interest, such that the disclosure is primarily in the public interest. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" FWW and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

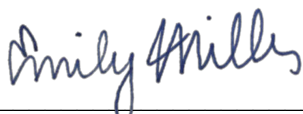
## Conclusion

Accordingly, based on the above analysis, the requested records bear directly on identifiable operations and activities of the EPA, will contribute significantly to a broad public understanding of the EPA's activities and operations regarding implementation and enforcement of the New Mexico CAFO program, and will not serve any commercial interest on the part of the FWW. Under these circumstances, FWW fully satisfies the criteria for a fee waiver. If for some reason EPA denies the fee waiver in whole or in part, please contact me before incurring any costs related to this request. If EPA does not fully grant the fee waiver and costs are incurred prior to contacting me, FWW will not be responsible for those costs. FWW reserves the right to appeal any decision to wholly or partially deny the fee waiver request in this matter.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact me at (646) 369-7526 or [eamiller@fwwatch.org](mailto:eamiller@fwwatch.org).

Thank you in advance for your prompt reply.

Sincerely,

A handwritten signature in blue ink that reads "Emily Miller".

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